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QUESTION PRESENTED

Whether the Export Clause of the United States Constitution precludes the application of a federal ad valorem tax, known as the Harbor Maintenance Tax (26 U.S.C. § 4461), on articles to be exported from United States' ports.

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INTEREST OF AMICUS CURIAE

Founded in 1907, The National Industrial Transportation League ("the League") is a voluntary organization of over 1,000 shippers, and groups and associations of shippers, that conduct industrial and/or commercial enterprises of all sizes throughout the United States and, in a number of cases, in locations overseas. The League is the oldest and the largest nationwide organization representing shippers that move all kinds of commodities, via all modes of carriage, across interstate, intrastate and international boundaries. Accordingly, the League's membership is comprised of United States importers and exporters. As such, many League members pay the Harbor Maintenance Tax ("HMT"), 26 U.S.C. § 4461 (1997), on exported commodities.[1]

A number of League members have filed claims in either the United States Court of International Trade ("CIT") or the United States Court of Federal Claims ("CFC") seeking refunds of the money paid by them under the HMT, as applied to exports. All refund cases have been stayed in either the CIT or the CFC pending resolution of this case by the Court. Accordingly, a number of League members are similarly situated to the respondent United States Shoe Corporation, and therefore

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[1] Pursuant to Supreme Court Rule 37.6, counsel of record and additional named counsel for Amicus Curiae wholly authored the instant brief. The expense of preparation was solely incurred by The National Industrial Transportation League. The League has received the consent of Petitioner and Respondent for the filing of this brief in support of Respondent.

maintain a direct and substantial interest in this case. The League also participated as an amicus curiae in the proceeding before the Court of Appeals for the Federal Circuit.

The League's membership is also vitally concerned with the impact of the HMT on the competitiveness of United States products exported overseas. In today's global economy, the manufacturers that comprise the League's membership are increasingly required to compete not only at home but also abroad. By taxing exports, the HMT increases the cost of exporting goods, substantially so for higher-valued commodities, thereby reducing the competitiveness of American products.

The HMT has further harmed the United States' economy and ports, because a number of shippers have sought to avoid this substantial burden on exportation by diverting their cargo to Canadian ports. Canada Cargo Diversions Cuts Both Ways, AMERICAN SHIPPER, Oct. 1994, at 78.[2] The reduction of cargo shipped through United States ports has been particularly acute in the Northeast, Great Lakes and Pacific Northwest regions.[3] For

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2 See also Harbor Tax Rollback Proposed In Bill Introduced In House, INSIDE DOT & TRANSPORTATION WEEK, Mar. 24, 1995, where it was reported that "the tripling of the HMT in January 1991 pushed shipping costs for companies moving high-value consignments such as photographic equipment or machinery by as much as 25 percent, forcing many local companies to divert their shipments through Canadian terminals, primarily located at the Port of Montreal."

3 See note 1.

example, in 1992 it was reported that "the Port of Boston. . . is losing between 10,000 and 15,000 forty-foot containers of cargo to Canadian ports yearly because of the tax." Push for Harbor Tax Rollback: New England Port/Shipper Coalition; Ports, AMERICAN SHIPPER, Nov. 1992, at 85. Recent trade reports reveal that the amount of cargo being diverted to Canada from the United States is growing, and that avoidance of the HMT is one of the primary reasons for the diversion. Canadian Ports Gain in Transatlantic, AMERICAN SHIPPER, Mar. 1997, at 66 (reporting that in 1995, the Port of New York/New Jersey lost 100,000 containers of cargo to Canada). Because many shippers must ship to and from American ports, they have a substantial interest in ensuring that U.S. ports remain competitive.

Accordingly, ensuring that the HMT does not unlawfully burden the competitiveness of American exports, and the nation's economy, is of vital importance to the League.

STATEMENT OF THE CASE

The League adopts the Statement of the Case set forth in the Brief for the Respondent in Opposition to the United States' Petition for a Writ of Certiorari, filed by United States Shoe Corporation. Respondent's Brief in Opposition at 3-8.

SUMMARY OF ARGUMENT

The HMT, as applied to articles exported from United States ports, is an unlawful tax that violates both the letter and spirit of the Export Clause. U.S. Const., art. I, § 9, cl. 5. This Court has consistently followed the intent of the Framers in broadly

construing the Export Clause and in declaring legislation unlawful that directly or even indirectly burdens exportation. The HMT is an ad valorem tax that is assessed directly against the value of the cargo to be exported and, thus, it places a direct burden upon exportation. The primary purpose of the HMT is to raise revenue for the Federal Government rather than to compensate the Government for benefits supplied.

The HMT is not a valid user fee. It fails at least two elements of the three part test articulated in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) and refined in Massachusetts v. United States, 435 U.S. 444 (1978), for determining whether an assessment is a valid user fee. Specifically, the HMT does not represent a "fair approximation of the cost of the benefits supplied" (Massachusetts, 435 U.S. at 463, n. 19) because there is no rational relationship between the cost of harbor maintenance and the value of articles exported. The HMT is unfairly assessed only against the exporter, an indirect beneficiary, rather than all port users, including the primary beneficiaries of port maintenance, such as the vessel owners and the ports themselves. Moreover, the HMT has repeatedly resulted in substantial surpluses which establishes an overt disconnect between the HMT liability of the exporter and the costs of the benefits received.

ARGUMENT

I. THE EXPORT CLAUSE HAS BEEN AND SHOULD BE BROADLY CONSTRUED AND STRICTLY ENFORCED

The Export Clause simply states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., art. I, § 9, cl. 5. As this Court recently observed, this plain and direct prohibition on the taxing power of the government has been broadly construed and strictly enforced. United States v. International Bus. Mach. Corp., 517 U.S. 843, 135 L. Ed. 2d 124 (1996) ("IBM"). The words, history and purpose of the Export Clause establish that the Framers intended that the application of the Export Clause should be expansive, rather than narrow. This Court has repeatedly adhered to the Framers' purpose in evaluating the validity of federal assessments applied directly or even indirectly to U.S. exports. Following this Court's precedent and the Framers' intent, the lower courts in this case correctly determined that the HMT, which places an ad valorem levy against articles moving in the United States foreign commerce (26 U.S.C. § 4461(b)), is an unconstitutional tax as applied to exports. The Government has not offered any compelling legal basis for this Court to alter its consistently broad application and strict enforcement of the Export Clause. Thus, the decision of the Federal Circuit should be affirmed.

A. The Words and History of the Export Clause Require That It Be Broadly Construed

The evidence surrounding the drafting of the Export Clause establishes that the Framers of the U.S. Constitution recognized that unburdened trade of American products was vitally important to the prosperity of the United States. The Export Clause, which sought to address the concern that the taxation of exports would result in discrimination between the States and would hinder the competitiveness of such goods abroad,[4] has assisted in leading the United States to become one the world's largest and most successful economies. The Framers' intent to foster trade continues to have enormous application today, as the United States develops as a world leader in the evolving global economy.

The intent of the Framers in establishing the Export Clause was to ensure that "the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation." United States v. Hvoslef, 237 U.S. 1, 13 (1915) ("Hvoslef"), citing Miller on the Constitution, p. 592. The records of the Constitutional Convention reveal that the Export Clause was initially proposed by delegates from Southern states who feared that a Congress largely controlled by the Northern states would result in trade-barring taxation on their highly competitive export articles of tobacco, cotton, indigo and rice. IBM, 135 L. Ed. 2d at 139, citing 2 M.

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4 2 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 363 (1937) (statements by Mr. Clymer).

Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 95, 305-308, 359-363 (rev. ed. 1966). These fears were also shared by delegates representing the Middle states of Pennsylvania and New Jersey who opposed the taxation of wheat to be exported to foreign markets. IBM, 135 L. Ed 2d at 148 (1996) (Kennedy, J., dissenting with Ginsburg, J.).

Assertions by the Government, both in the past and recently, that the fear of discrimination between States which led to the adoption of the Export Clause requires that this provision be narrowly construed have been rejected as contrary to the Framers' intent. The unvarnished command set forth in the words of the Export Clause is the first indicia of this broad intent. See Fairbank v. United States, 181 U.S. 283, 292-93 (1901) ("Fairbank") (the broad intent of the Clause is "obvious from the language of the clause itself."); IBM, 135 L. Ed. 2d at 139 ("While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language.") (emphasis added).

The intent of the Framers that the Export Clause be broadly applied is also evidenced by a history which shows that two separate amendments proposed at the Constitutional Convention to limit the scope of the Clause were rejected by a majority of the delegates. United States Shoe Corp. v. United States, 907 F. Supp. 408, 413 (CIT 1995) ("U.S. Shoe"); Fairbank, 181 U.S. at 293. In Fairbank, a leading

Export Clause case, the Court described the purpose of the Clause in light of its history:

> the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent . . . is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation . . . .

181 U.S. at 292. The other proposed amendment that would have permitted export taxes if approved by a two-thirds majority in both houses was also rejected. IBM, 135 L. Ed. 2d at 148 (Kennedy, J. dissenting with Ginsburg, J.), citing 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 363.[5]

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[5] The trade policy contemplated by the Framers, which would allow for discrimination against the products of other nations imported into the United States but not against U.S. goods exported to other nations, was further expressed by James

Accordingly, the Framers' purpose is clear: the export of U.S. articles was desired and recognized as a benefit to the American economy; this benefit was not to be burdened by taxation of any type, notwithstanding the Government's need for revenue. And so all governments—Federal and State—were barred from assessing taxes on exported articles. 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 410-12, 556-58 (Gaillard Hunt & James Scott Brown eds., 1987).

Madison of Virginia who on the floor of the First Congress stated: "'We possess natural advantages which no other nation does; we can, therefore, with justice, stipulate for a reciprocity in commerce. The way to obtain this is by discrimination.' Congress passed bills levying tonnage duties eight times higher on foreign vessels than on U.S. ships in American ports, and also imposed import taxes on foreign goods entering the country. Americans wanted freer trade, but they were prepared to play rough mercantilist trading games if necessary." Walter LaFeber, THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD, 1750 TO PRESENT 45 (1994) (citing 3 IRVING BRANT, JAMES MADISON 246-54 (1944-1966)). See also THE FEDERALIST No. 4, at 98 (John Jay) (Isaac Kramnick ed., 1987). It was also well understood by the Framers that, in the competition for export markets, taxes were passed on to the consumer overseas, making American export articles relatively more expensive and less competitive. As Alexander Hamilton observed, "[i]mposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will in time find its level with the means of paying them." THE FEDERALIST NO. 21, at 176 (Alexander Hamilton) (Isaac Kramnick ed., 1987). To tax American exporters was to injure American comparative advantage. Compare THE FEDERALIST NO. 35, at 232 (Alexander Hamilton) (Isaac Kramnick ed., 1987) with THE FEDERALIST NO. 52, at 276 (James Madison) (Isaac Kramnick ed., 1987).

B. This Court Has Broadly Construed the Export Clause

The Framers' clear intent has been repeatedly honored in the decisions of this Court. The Court has adopted an expansive view of the taxation restriction, seeking to protect not only the letter but also the spirit of the Export Clause:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty" . . . . It is a restriction on the power of the Congress . . . [that] should be enforced in accordance with its letter and its spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed.

Fairbank, 181 U.S. at 290 (emphasis added) (federal stamp tax imposed on export bills of lading unconstitutional). Accordingly, this Court has declared unconstitutional not only legislation that places a direct assessment on the article to be exported but also legislation that burdens the process of exportation. In Hvoslef, supra, the Court invalidated a tax applied to maritime charter parties, finding that the constitutional freedom from taxes provided to exported articles,

> plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than

> that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.

237 U.S. at 13. The Court's most recent Export Clause case, IBM, decided less than two years ago, reaffirmed the Court's prior decisions and the long-standing broad construction of the Export Clause. In IBM, the Court re-established that "our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process." IBM, 135 L. Ed. 2d at 130. The Court further confirmed its prior holding that "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that fall on exports during the course of exportation." Id. at 132-33, citing Fairbank, Hvoslef, and Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915).

Against this backdrop, the HMT cannot be permitted to stand. As both the CIT and the Court of Appeals determined, the HMT is not simply a fee for port use as contended by the Government but a direct and substantial tax burden on articles exported from U.S. ports.

II. THE HARBOR MAINTENANCE TAX IS A TAX

The HMT is a "tax" designed to raise revenue for the Federal Government. The very name of the statute established by Congress designates the assessment as the "Harbor Maintenance Tax." The provisions of the statute also repeatedly describe the

assessment as a tax. 26 U.S.C. § 4461(a) ("There is hereby imposed a tax on any port use."); § 4461(b) (referring to the "Amount of tax"); § 4461(c) (referring to "Liability and time of imposition of tax") (emphasis added). The assessment and collection provisions of the HMT are codified in the Internal Revenue Code, which is the source of the nation's tax laws. Moreover, the HMT was derived from the Water Resources Development Act of 1986,[6] and was included in that Act under Title XIV—Revenue Provisions. While this nomenclature is not dispositive of the nature of the assessment (U.S. Shoe, 907 F. Supp. at 411), the breadth and number of these references clearly cast doubt on the Government's claim that the HMT is not a revenue raising tax but merely a fee for port use.

The method of collection and the treatment of HMT funds, however, undoubtedly establishes that the HMT is a revenue-raising measure. HMT funds from exports are deposited in the Harbor Maintenance Trust Fund ("HMTF"). 26 U.S.C. § 9505. These funds are considered by the Federal Government to be "on budget" and, thus, are used by the federal government in calculating federal revenue and the federal budget deficit. As noted by the CIT, "any monies contributed by such [HMT] funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit." U.S. Shoe, 907 F. Supp. at 412, citing H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("[t]he increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount

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6 Pub. L. No. 99-662, 100 Stat. 4082 (1986).

by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). The Government claims that the statutory limits on the appropriations of such monies, for port and harbor maintenance only, prevents HMT funds from being a general revenue source and, thus a tax. But this attempt to magically convert what would clearly be tax revenue into something else, by the simple expedient of designating beforehand the use to which the taxes so collected will be put, cannot override the simple fact that the HMT funds provide a direct benefit to the general treasury of the United States.

Moreover, as discussed further in Section IV below, the surpluses that have accumulated year-after-year in the HMTF reveal the utter lack of a nexus between the tax paid by exporters and the expenditures of the funds for port maintenance. This pattern of surpluses negates any inference that the HMT is, in spite of its name, a user fee. As the CIT properly found, "the primary purpose of the Tax is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" U.S. Shoe, 907 F. Supp. at 414.

III. THE HARBOR MAINTENANCE TAX IS A TAX ON EXPORTS

As established above, under the Court's reading of the Export Clause, if the HMT is a tax imposed upon U.S. exports it is unconstitutional. The HMT is an ad valorem tax equal to 0.125 percent of the value of the cargo to be exported. 26 U.S.C. § 4461(b). Thus, the tax is directly attached to the articles to be exported. In Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos., 435

U.S. 734 (1978), the Supreme Court upheld a state business tax levied on the gross income of a stevedore's loading service as not violative of the Import-Export Clause. The basis for this conclusion was that the tax did not relate to the value of the goods, and therefore could not be considered taxation upon the goods themselves. Id. at 757. In contrast, the HMT is levied wholly on the value of the goods and therefore is a tax on the goods themselves.

Even assuming, arguendo, that the HMT is only a tax of "port use" rather than a tax on the exports themselves (which it is not), the HMT is still unconstitutional because it plainly places a significant burden on the course of exportation. This Court's strict enforcement of the Export Clause extends not only to "federal taxation of goods in export transit" but also to "certain services and activities closely related to the export process." IBM, 135 L. Ed. 2d at 133. For example, in Fairbank, supra, the Court found that a federal stamp tax applied to foreign bills of lading violated the Export Clause since, in substance and effect, it was a tax on the articles exported under the bill of lading. 181 U.S. at 293-94. While the tax at issue in Fairbank was not on the articles themselves but on the export documentation, the tax was found by the Court to violate the Export Clause since such documentation is "invariably associated with every cargo of merchandise exported to a foreign country . . . ." Id. at 294. The HMT is even more closely associated with the cargo to be exported than a bill of lading, since the tax is assessed directly against the value of the cargo to be exported. 26 U.S.C. § 4461(b). Moreover, the concept of "port usage" is itself inherently tied to the exportation process, as every

article leaving the United States by sea must in some way use a port.

In a number of cases, this Court has found certain taxes not levied directly upon the articles to be exported still to be in violation of the Export Clause's broad prohibition. See IBM, supra (tax on premiums paid to foreign insurance carriers); Hvoslef supra (tax levied against maritime charter parties involving the export of U.S. commodities); Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915) (tax on insurance policies applied to exports); A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 70 (1923) (federal sales tax imposed upon baseballs and bats to be exported). The taxes at issue in those cases, all of which violated the Export Clause, involved far less of a burden on the process of exportation than the HMT.

Furthermore, in Spalding, the Court discussed at which point the export process begins in evaluating the application of the Export Clause, and stated:

> So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin . . . . In this case, for instance, while the goods were in the process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. (citations omitted) On the other hand no one would doubt that

> they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued.

262 U.S. at 69 (emphasis added). In that case, title to the goods to be exported passed upon delivery to the carrier, and it was at that point the sales tax was incurred. The Court held that delivery of the goods to the carrier was clearly a point within the process of exportation. Spalding, 262 U.S. at 70 ("To put it at any later point would fail to give to exports the liberal protection that hitherto they have received . . . .").

In the case of the HMT, liability is imposed "in the case of cargo to be exported from the United States, at the time of loading . . . ." 26 U.S.C. § 4461(c)(2)(A). Moreover, "port use" to which the HMT applies is defined as "the loading of commercial cargo on . . . a commercial vessel at a port." 26 U.S.C. § 4462(a)(1)(A). Under the test set forth in Spalding, the HMT plainly is encompassed within the exportation process. The Government's assertion that the HMT merely regulates port usage is irrelevant since such regulation is impermissible if it is accomplished by way of an unlawful taxation of exports. United States Shoe Corp. v. United States, 114 F.3d 1564, 1575 (Fed. Cir. 1997) ("the power to regulate commerce cannot completely override the effect of the Export Clause.").

Thus, whether the HMT is a direct assessment on U.S. export articles or an indirect assessment based upon "port use," the HMT is an unlawful tax on exports that is contrary to the Constitution. As the CIT correctly found, "Congress could not have imposed the Tax any closer to exportation, or more

immediate to the articles exported." U.S. Shoe, 907 F. Supp. at 418. As the HMT offends both the letter and spirit of the Export Clause, the decision of the Court of Appeals should be affirmed.

IV. THE HARBOR MAINTENANCE TAX IS NOT A USER FEE

The Government attempts to escape the conclusion compelled by the words of the Export Clause, its history, and this Court's pronouncements by arguing that the Harbor Maintenance Tax is not a tax, but a user fee, under the standards set forth by this Court in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) ("Evansville") and that case's refinement in Massachusetts v. United States, 435 U.S. 444 (1978) ("Massachusetts"); cases that did not even involve the Export Clause. To constitute a "user fee" under the rule in Evansville/Massachusetts, the HMT must:

> (1) not be applied in a discriminatory fashion;
>
> (2) must be reasonably related to an exporter's use of a port; and,
>
> (3) must not recoup moneys in excess of benefits conferred.

Massachusetts, 435 U.S. at 466. It should be noted that if the HMT fails any one prong of the Evansville/Massachusetts test, it is a tax, and therefore runs afoul of the Export Clause. In this case, the HMT fails at least the second and third

prongs of the Evansville/Massachusetts test, and must therefore fall.

A. The HMT Is Not Based Upon a Fair Approximation of the Cost of Benefits Supplied

Under the second element of the rule in Evansville/Massachusetts, an assessment fails as a user fee if there is no reasonable parity between the exporter's liability to pay the HMT and the benefit the exporter receives from the HMT program. The Court requires that a "user fee be a 'fair approximation of the cost of benefits supplied.'" United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (quoting Massachusetts v. United States, 435 U.S. 444, 463 n.19). See also Hager v. City of West Peoria, 84 F.3d 865, 871 (7th Cir. 1996).

Proof of the HMT's violation of the "fair approximation" rule is underscored by three characteristics of the HMT: (1) it is assessed on the value of the articles exported, not their weight, density or other transportation characteristics; (2) it is not applied against all users, as a user fee would contemplate, but rather only against the shipper; and, (3) unlike a user fee, there is a serious mismatch between the benefits and the liability as to the port actually used.

1. The HMT is assessed on the value of goods, rather than properties that reflect the cost of the benefits supplied.

For those who do incur the HMT tax liability, the amount of the tax is, in many cases, directly at

odds with the impact a particular use has on port facilities. This peculiarly unfair relationship stems from the fact that the HMT is imposed on an ad valorem basis, rather than on a tonnage or similar basis. 26 U.S.C. § 4461(b). In choosing an ad valorem assessment, Congress placed a heavier burden on export articles that are light in weight and high in value: an exporter of light, high-valued articles will incur a greater HMT liability than a shipper of heavy-loading bulk products. But the need for and cost of harbor maintenance has no rational relationship whatsoever to the value of articles exported, but rather to the quantity and tonnage of goods swung over the quay and carrier draft through the channel. Indeed, the cost of maintaining harbor facilities is usually greater for heavy-loading bulk products, which perversely pay a smaller percentage of the total monies collected under the HMT, compared to high-value, light loading products. The existence of this high weight/low value windfall shows that no reasonably fair correlation exists between the tax liability and the benefit derived.

2. The HMT is assessed against only one of the users and beneficiaries of the tax rather than all who use the harbor facilities and receive the benefits supplied

The relationship between HMT liability and benefit is also unbalanced in another way, since it is assessed solely against the exporter, and not upon the owner of the ship that directly uses the port facility. The Government argues that exporters and other shippers are the "direct beneficiaries" of the HMT. But the facilities improved by HMT funds surely

benefit the shipper and exporter no more than they benefit the carrier that owns the vessels directly using the port, or the port itself. Yet, only the shipper and exporter pay the tax, and neither the carriers nor the ports have HMT liability. See S. Rep. No. 126, 99th Cong. 2d Sess. 7, 9 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6644, 6647 ("The tax in title 8 is not on the harbor, nor is it on the vessel's operator or owner.").

In its Brief, the Government argues that taxes are allocated by economics, not by statutes, and therefore it is immaterial whether the HMT is levied against the shipper, the vessel owner, or some other person. But this assertion, which finds no support in the record, is not necessarily true. The Government's assertion is based upon the unproven assumption that the shipper, who is the person in the export chain against whom the HMT is levied, can readily force the tax to be passed up or down to other members of the chain, and that therefore the identity of the direct payee of the tax is immaterial. But the ability to "pass through" an assessment is not always (or even often) friction-free, and there may—or may not—be market mechanisms to force the payment of the tax up as well as down the chain. The American shipper, who is one of the last parties in this particular supply chain, in fact generally has a single choice: to swallow the cost of the tax and cut his margins.

3. The HMT bears no relationship to the benefits received by a particular port that is used by the user

At the time of passage, Senator George Mitchell (D-Maine) stated that "Portland, Maine requires an annual average of approximately $290,000 for port maintenance. The ad valorem tax on cargo entering Portland would raise over $1 million dollars." S. Rep. No. 126, 99th Cong., 2d Sess. (1986) (Additional Views of Senator Mitchell), reprinted in 1986 U.S.C.C.A.N. at 6704; see also Army Corps of Engineers, Briefing Book and Fact Sheets on the Harbor Maintenance Fee [sic] and Trust Fund at 1 (Feb. 14, 1990). Senator Mitchell's observations illuminate another aspect of the absence of a "reasonably fair" approximation between liability and benefit with respect to the HMT: the utter lack of connection between the cost of maintaining a particular harbor and the tax assessed on goods going through that harbor. Shippers and exporters using port facilities harbored within rocky shores and accessed through naturally deep channels receive less in benefits than a shipper utilizing fledgling or neglected port facilities constructed within a tidewater, amidst shallow sands and tidal marshes.

This is not to say that "fair approximation" would require, as the Government argues, separate fees and trust funds for each port; some categorization would clearly be permissible. But the Government cannot ignore the complete mismatch between the burden of the HMT and the benefits supplied by arguing that nationwide port services are available if needed. See Gov't Br., p. 29. Such an

interpretation of the Evansville/Massachusetts test would render every challenged nationwide "tax" on exports a permissible "user fee," as long as it was earmarked for some transportation purpose, and would effectively eliminate the third prong of the test altogether. The Government is required to show that the Congress rationally attempted to link liability and benefit, a linkage that was not and cannot be made here.

B. The Revenue Collected Under the HMT Is Far In Excess of the Cost of Maintaining American Ports and Harbors.

Having failed the second of the three elements required under this Court's decisions in Evansville/Massachusetts to categorize an assessment as a "user fee" and not a "tax," the HMT fails the third element as well. In order to pass the third prong of the rule, a system of assessment must collect revenues that are roughly equal to the amount spent in furtherance of the use for which the government is seeking compensation. If a system of assessment functions as a "goose-that-lays-the-golden-egg," then the Court categorizes the proceeds from that system of assessment as taxes, not user fees. Massachusetts, 435 U.S. at 466-67.

Since its imposition in 1986, the HMTF has amassed a huge surplus. By the end of fiscal year 1992, the cumulative surplus in the HMTF had already reached $120.9 million. First Annual Report on the Status of the Harbor Maintenance Trust Fund at 6. Deposits into the HMTF during fiscal year 1994 totaled $646.2 million, whereas expenditures during the same accounting period equaled only $487.6

million. Third Annual Report at 1-2. This yielded a surplus of $158.6 million, or 25% of the total tax levied. Indeed, as the following chart shows, HMT revenues have exceeded expenditures in every single year of the tax's existence, and the surplus in fiscal year 1998 alone is expected to be half again as much as the amount collected. By the end of fiscal year 1999, the total accumulated surplus is expected to be over three times the amount of annual expenditures. Third Annual Report at 6.

A fund surplus of this magnitude is more than a reserve, and cannot be rationally argued to be needed for fluctuations in expenditures over time. The HMTF is simply a depository for collections used to offset the federal deficit.

HMT Surplus Imbalance				
Year	**Revenues, Expenditures and Yearly and Cumulative Surplus** (millions of dollars)[1]			
FY	**(A)**	**(B)**	**(C)**	**(D)**
	Revenues[2]	Expenditures[2]	FY Surplus[3]	Cumulative Surplus[4]
1987	53.2	39.0	14.2	15.2
1988	161.0	157.6	3.4	9.7
1989	183.1	169.6	13.5	12.3
1990	197.6	170.6	27.0	30.3
1991[5]	395.5	342.7	52.8	72.8
1992	531.1	473.4	57.7	120.9
1993	650.7	460.0	190.7	303.3
1994	646.2	487.6	158.6	452.4
1995	665.3	472.4	192.9	645.2
1996	717.5	558.9	158.6	558.9
1997	771.2	543.9	227.3	1,031.2
1998	822.5	533.9	288.6	1,319.8
1999	864.0	523.9	340.1	1,659.9

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1 All figures rounded off to the nearest $100,000; Saint Lawrence Seaway Tolls omitted.

2 The 1987 figures are taken from First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1987-1992); J.A. at 50 ("Revenues & Transfers"); the 1988 figures are from Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1993); J.A. at 67 ("Revenues & Transfers", undated); and all figures from 1989 through to the projections from 1995 to 1999 are taken from Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1994); J.A. at 103-104 ("Revenues & Transfers", undated).

3 Column (B) subtracted from Column (A).

4 Same as note 2. The U.S. Government's reported Cumulative Surplus is higher than a straight-line computation of the successive fiscal year surpluses added together.

5 Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Pub.L. No. 101-508, 104 Stat. 1388-436, raised the HMT from a 0.04 to 0.125 percent ad valorem rate.

CONCLUSION

The decision of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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